No. 5953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOSHIKO INABA,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California,

Appellee.

APPELLANT'S OPENING BRIEF.

ALBERT H. ELLIOT,
GUY C. CALDEN,
544 Market Street, San Francisco,
Attorneys for Appellant.

RAYMOND L. FRICK,
544 Market Street, San Francisco,
Of Counsel.

Subject Index

Table of Authorities Cited

No. 5953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOSHIKO INABA,
Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, San Francisco, California,
Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from the order and judgment of the United States District Court in the Southern Division for the Northern District of California, denying the Petition for Writ of Habeas Corpus filed herein by petitioner and dismissing the Petition for Writ.

STATEMENT OF THE CASE.

Petitioner, a minor female citizen of the State of California and of the United States, went to Japan in the year 1911 and remained there until June 15th, 1927, at which time she went through some form of alleged marriage to Torao Yamamoto, a citizen of the Empire of Japan. At the time petitioner left the State

of California and went to Japan she was not accompanied by her parents, but they remained in the State of California and ever since have remained therein and are now residents of and domiciled therein. The consent of the parents to the alleged marriage was never given.

Petitioner never lived with her alleged husband, and within four months after the alleged marriage and immediately after she had gained knowledge of said alleged marriage, she promptly objected thereto and on the 22nd day of September, 1927, caused her family record to be changed so that she would not thereby be a member of the family of the said Torao Yamamoto, but would be a member of her own family.

Petitioner and her brother arrived at the Port of San Francisco, September 3rd, 1928. The brother was admitted and admission is denied petitioner. The ground of denial of admission to petitioner is that she has lost her American citizenship by expatriation because of her alleged marriage, and because she is of a race ineligible to citizenship.

We shall attempt to show in this argument that in denying the Petition for Writ of Habeas Corpus and dismissing the Petition for Writ, the Court erred in the particulars indicated by appellant's assignment of errors, appearing at page 26, et seq., of the Transcript of Record filed herein, as follows:

That the Court erred in denying the Petition for a Writ of Habeas Corpus herein and remanding petitioner and appellant to the Immigration authorities for deportation.

That the Court erred in holding that it had no jurisdiction to issue a Writ of Habeas Corpus as prayed for in the Petition herein.

That the Court erred in holding that the allegations of the Petition were not sufficient to justify the issuance of the Order to Show Cause, as prayed for in said Petition, and in remanding petitioner and appellant to the Immigration authorities for deportation.

That the Court erred in holding that the allegations contained in the Petition for a Writ of Habeas Corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of petitioner from custody as prayed for in said Petition.

That the Court erred in holding that the decisions of the Board of Special Inquiry and of the Secretary of Labor are not erroneous in law and that the said officials have not misconstrued the expatriation laws of the United States.

That the Court erred in not holding that the imprisonment and detention of petitioner and appellant are illegal and without authority for the reasons set forth in appellant's Amended Petition for Writ of Habeas Corpus, to-wit:

First, that said petitioner is a citizen of the United States and has committed no act of expatriation; and

Second, that the said John D. Nagle, Commissioner of Immigration, has no authority in law, or jurisdiction, to issue any warrant for the removal and deportation to Japan of petitioner, as there is no proof before the said Commissioner of Immigration to show

or justify the conclusion that petitioner is not a citizen of the United States, but on the other hand, that the evidence, as herein alleged, amply shows that the alleged marriage of petitioner and of said Torao Yamamoto was no marriage at all under the laws of Japan or under the laws of the State of California or of the United States.

That the Court erred in holding that petitioner and appellant is of a race ineligible to citizenship, not excepted by any of the provisions of the Immigration laws, and that she had lost her American citizenship by marriage to a person not a citizen of the United States and not eligible to citizenship therein.

That the judgment made and entered herein was and is contrary to law.

That the judgment made and entered herein is not supported by the evidence.

That the judgment made and entered herein was and is contrary to the sworn allegations of the Petition for a Writ of Habeas Corpus.

That the judgment made and entered herein is contrary to the evidence.

ARGUMENT.

The alleged marriage must be tested either under the laws of the State of California or under the laws of the Empire of Japan. It will be our contention that whether tested under the laws of the one jurisdiction or the other, the decision of this Court must be in favor of petitioner.

If the alleged marriage is to be tested under the laws of the State of California, it is either void or voidable under Section 82 of the Civil Code, for the reason that petitioner did not consent to the alleged marriage because,

(a) Her consent was obtained by fraud; and

(b) Her consent was obtained by force and coercion.

If the alleged marriage is to be tested under the laws of Japan, it is either void or voidable, under Article 772 of the Annotated Civil Code of Japan, because the consent of the parents was not obtained; and also, under Article 783 of said Code for the reason that petitioner did not consent to said alleged marriage because,

(a) The alleged consent was obtained by means of fraud; and

(b) That the alleged consent was obtained by means of coercion.

If the alleged marriage was void and an absolute nullity, there was, of course, no marriage at all. If voidable, it has been either absolutely annulled, ab initio, by the acts and conduct of petitioner, or at the very least such acts and conduct of petitioner constitute a divorce.

If there was no marriage at all, there was, of course, no loss of citizenship.

If we admit the marriage but concede that it has been annulled by the acts and conduct of petitioner and as disclosed by the record of this case, there is, of course, no loss of citizenship. If there has been a

divorce, petitioner has the absolute right to regain her citizenship and to be admitted to the United States for this purpose as a matter of right, and under the authority of the *Yoshiko Hoshino* case, cited infra.

THE ALLEGED MARRIAGE WAS VOID—AN ABSOLUTE NULLITY.

It is our contention that the alleged marriage was absolutely void and a nullity. This is alleged in petitioner's Amended Petition and is in no way controverted by the Record. We submit that an examination of Respondent's Memorandum of Excerpts of Testimony from the original Immigration Record on pages 14 to 23 inc., conclusively shows that the alleged marriage is void for the reasons above set forth.

On page 16, Hikotaru Inaba, the father of petitioner, testified before the Board of Special Inquiry, in part, as follows:

> "My brother-in-law, my wife's brother, who had charge of the children in Japan, *induced* my daughter to be registered into my older brother's family, as the wife of Yamamoto, Torao; *she did not wish to be married,* but my brother-in-law overruled her objection; I do not know when they registered the girl as I was in the United States, and I also cannot say when the registration as (was) annulled." (Italics here and elsewhere in this brief ours.)

On page 21, petitioner's testimony in part is as follows:

> "I do not know what legally the age is, but I think it is 16 and I was over that age when I married."

(This testimony clearly shows an entire lack of knowledge of the law by petitioner as the age of consent under Japanese law is 25.)

In response to the question as to whether either petitioner or Torao Yamamoto were married to another at the time of petitioner's alleged marriage, she testified, as follows:

> "No, he had married, so I had been told, no doubt he was divorced. I am not familiar with the details, as he was in another ken."
>
> "Q. Do you know that he had previously been married?
>
> A. I was told he was married—that is, someone in the family told me, I cannot remember who."

And on page 22 of the said Transcript appears this illuminating testimony:

> "Q. Were you coerced into marrying Mr. Yamamoto?
>
> A. I do not know whether you would call it 'coerced' but to me it was as they had made all arrangements. They simply went ahead and told me *I must go through with it;* according to the Japanese way of thinking, I had no alternative *and no voice in the matter.*
>
> Q. Did you voice any objection to marrying him?
>
> A. *Yes I did. I told him, no.* One of my objections was that I had not finished school and also that I had not seen him since we were children.
>
> Q. What was said to your objections?
>
> A. They simply said, *'You will have to go through with it.'* The uncle in charge of my affairs said that. I refer to my mother's brother, Inaba.
>
> Q. Have you any statement to make?

A. I wish to explain that my mother's brother, Inaba, had taken care of us and stood as my father since I went to Japan so he made the arrangements for this marriage without consulting me according to the Japanese custom. *After I was notified that I was to be the wife of my cousin Torao Yamamoto I objected and kept objecting until they canceled the registration and re-registered me into the Inaba family.*"

We will not burden your Honors by referring to the effect of fraud, force and coercion in connection with an alleged marriage under the laws of California but shall point out the law of Japan in this regard.

Article 785 of the Annotated Civil Code of Japan, supra, reads, as follows:

> "A person who has been induced to contract a marriage owing to fraud or coercion may apply to a court for its annulment."

And quoting from what is called the "Explanation" to Article 785:

> "Such person had no intention to get married, —that is, to say, he or she was not married in accordance with his or her true intention and may, therefore, properly annul the marriage."

Section 772 of the Annotated Civil Code of Japan, reads in part, as follows:

> "In order to get married a child must first obtain the consent of the father and mother belonging to the same house. This does not apply, however, when a man has attained full thirty years and a woman full twenty-five years * * *."

Under the testimony just quoted, and the law, it is difficult for us to see how any doubt can exist as to the fact that the alleged marriage of petitioner was

an absolute nullity. Under California law it is perfectly clear that she did not consent to the alleged marriage because of fraud and force (coercion), and under the law of Japan it is equally evident that petitioner's consent was never given because of fraud and coercion, and in addition to this that the alleged marriage was a nullity for the reason that the consent of petitioner's parents was never obtained as required by the law of Japan. It will be noted in this connection that under Article 772 of the Annotated Civil Code of Japan, supra, it is necessary that the consent of *both* the father and mother be secured where the woman is under 25 years of age. The only evidence disclosed by the record, as to consent of the parents, is found on the bottom of page 16 of the Transcript of Record, and the top of page 17, where the testimony of petitioner's father reads as follows:

> "A. I did not know about the proposal, as my brother-in-law spoke to me about it and as I was greatly obligated to him for taking care of my children. I said, 'Do whatever you please'; and I left it in his hands. This matter was brought before me when I was on a visit to Japan."

For some reason unknown to us respondent seems to place great reliance upon this one bit of scanty testimony on the question of the consent of the parents to the alleged marriage, because he has underscored this testimony in its entirety. We are unable to see the importance of it for the reasons: that it is entirely too vague to amount to the consent of the father, and does not show whether the alleged consent was given before or after the alleged marriage, and still leaves undisputed the fact that the

consent of the mother was also necessary, and that is nowhere in the record shown to have been given.

We submit that all other portions of the testimony which are set forth in respondent's Memorandum of Excerpts of Testimony are merely conclusions of witnesses, in one instance even the conclusion of the interpreter as to whether or not the alleged marriage union was dissolved is given.

IF THERE WAS A MARRIAGE, IT IS VOIDABLE AND HAS BEEN ANNULLED AB INITIO BY ACTS AND CONDUCT OF PETITIONER AS DISCLOSED BY THE RECORD.

On page 15 of Respondent's Memorandum of Excerpts of Testimony, it is shown that petitioner on the 22nd day of September, 1927, was registered back into her own family. On the same page is also found the following testimony given by petitioner before the Board of Special Inquiry:

> "Q. Between the time of your registration into the family of Yamamoto and the time of your re-registration into your own family, were you considered to be the lawful wife of Torao Yamamoto?
>
> A. *I did not like the arrangement so I stayed in my own home; according to rules I showed my face at my husband's home, once, but that is all.*"

On page 17 of the record, petitioner's brother Akira testified as follows:

> "Q. Has your sister Toshiko, ever been married?
>
> A. She was at the age of 18, she never lived with her husband as his wife. They were cousins and my relatives thought it best to cancel her

marriage, *so that was done soon after the ceremony.*

Q. Did your sister live with her husband for about one month?

A. Maybe one or two months."

On page 22 of the record, petitioner testified in part, as follows:

> "After I was notified that I was to be the wife of my cousin, Torao Yamamoto. I objected and kept objecting and they cancelled the registration and re-registered me into the Inaba family."

On page 17 of the record, petitioner's father testified that he had received a letter, advising him that his daughter would not go to Yamamoto's house.

It is our contention that even if petitioner was married to Yamamoto, said marriage was almost immediately annulled as disclosed by the record.

As between the allegations of the petition and the testimony contained in the excerpts relied upon by respondent himself, we have nothing but conclusions of the witnesses for the respondents, while for the petitioner the testimony conclusively shows that there was no marriage, or even if we concede that there was one, that there was a subsequent annulment.

The only testimony which might seem in any way to favor respondent is that of the brother, Akira Inaba, as to the portion which we have quoted above, wherein he does testify in answer to the question as to whether petitioner lived with her husband, "maybe one or two months." We submit to your Honors that the witness was obviously confused in this answer and feel that we are justified, within the bounds of

reason, in suggesting that what the witness had reference to was the period of time between the alleged marriage and the termination thereof. When he was asked, the question, "Has your sister, Toshiko Inaba, ever been married?", his answer was that she had been at the age of eighteen, and then he volunteered the statement, "she never lived with her husband as his wife." There clearly would have been no reason for the witness to have changed his testimony in this regard and the leading question put to the witness clearly confused him.

In any event we have the testimony of the petitioner herself to the effect that she never lived with her husband, the testimony of the father of petitioner that she never lived with him and the original testimony of the brother to the same effect.

EVEN IF WE CONCEDE THERE HAS BEEN A MARRIAGE AND NO ANNULMENT, THERE HAS AT THE VERY LEAST BEEN A DIVORCE OR TERMINATION OF THE MARRIAGE, AND PETITIONER HAS THE RIGHT TO RE-ENTER THE UNITED STATES FOR THE PURPOSE OF REGAINING HER CITIZENSHIP.

Even were there no specific authorities to sustain our contention we would challenge anyone to dispute the proposition that this minor girl, *not an alien,* but a native of the State of California, has the absolute right under the circumstances of this case to come back to her native land and regain her citizenship. It would be anomalous and unthinkable that it could be said of this native-born girl that she, who by virtue of her birth in the United States is entitled to the full protection of all the laws thereof, and who enjoys

the most valued possession known to mankind, American citizenship, should now, because of this alleged marriage, find herself a "woman without a country."

It is axiomatic in the law that where one is given a legal right all incidental means necessary to the enjoyment of that right follow as a matter of course.

Fortunately we are not without specific authority to sustain our position. The case of *Yoshiko Hoshino* (decided by the United States District Court for the Territory of Hawaii, November 22nd, 1927, No. 1466) which has not yet reached the law books, by the strongest analogy, unequivocally gives the petitioner here the right to enter the United States for the purpose of regaining (if lost) her citizenship.

In this case, the petitioner was a Japanese woman who was born in Hawaii and had lived there all her life. She had lost her American citizenship by marriage to a Japanese alien, and the marriage relation having terminated she applied to the District Court of the Territory of Hawaii for naturalization. The Court took the view (to use the language of the learned counsel on the other side in their brief filed in the lower Court):

> "That the ratio limitation upon naturalization, which restricts that privilege to 'aliens being free white persons' and to aliens of African nativity and the persons of African descent, should not be considered applicable to persons who had once been American citizens by reason of birth, and hence, that the petitioner was eligible to citizenship and might be naturalized."

This is our exact point. We contend that it was never the intention of Congress to place in the same

classification foreign-born aliens and native-born persons who had lost their citizenship merely by marriages to aliens, and not in the manner in which we generally understand the term "expatriation," to-wit: an actual renunciation of allegiance to the United States by becoming naturalized in a foreign country.

To use the language of the learned Judge:

> "In my opinion the application of the petitioner does not come within either the spirit or the letter of section 2169 R. S., which applies almost exclusively to persons of alien birth; and it includes within its scope both men and women. It has no application to a special proceeding such as the one now before the court. In this connection, with the provision of section 2169 R. S. in mind, it is pertinent to observe that the Act of 1922, respecting the question now under consideration, deals, not with alien men and women, nor with women in general, but only with women of American birth, who, irrespective of their race, are or have been married to aliens. Obviously, the Act in this regard is special.
>
> As I view this matter, Congress, by the Act of 1922, intended to provide a new and special method in lieu of section 3 of the Act of March 2, 1907, whereby all American born women, irrespective of their race, who had lost their citizenship by marriage to aliens prior to September 22, 1922, could resume their citizenship by naturalization immediately, that is to say, during the marriage, with the exception of these who had married aliens ineligible to citizenship, and as to these, likewise irrespective of their race, they may resume their citizenship by naturalization after the 'termination of the marital status.' That such was the purpose of the Act of 1922, to my mind, is clear. This view, in my opinion, is fair and equitable, and accords with reason and jus-

tice. *I cannot believe that Congress intended by this Act to deprive an American born woman of her right to resume her American citizenship under the circumstances of this case and thereby place upon her the stigma of being a woman without a country.* Thus viewing the matter my conclusion is, that the petitioner Yoshiko Hoshino, is eligible to citizenship. The usual oath may be administered upon her appearance in open Court."

A CASE INVOLVING UNITED STATES CITIZENSHIP IS SUI GENERIS AND THE GOVERNMENT ITSELF IN A VERY ABLE BRIEF IN THE SO-CALLED ALIEN EXCLUSION CASES CONCEDES THIS TO BE TRUE.

It is admitted in the case at bar that the petitioner was a citizen of the United States and we quote from the brief of the learned United States Attorney only for the purpose of showing that not only is petitioner entitled to a judicial determination of her case as a citizen of the United States, regardless of the findings of the Immigration Board, but that great care should be taken that the rights of American citizenship shall not be taken from her except upon evidence that is clear and conclusive.

The learned United States Attorney says, quoting from page 47 of the brief referred to:

> "In other words, a natural-born citizen is, before temporarily leaving the land of his birth, a member of our population and under the protection of our national Bill of Rights, and his return works, in contemplation of law, a resumption of that protection.
>
> *These cases, therefore, of natural-born citizens distinguish sharply and strongly from the cases*

now before this Court, and stand upon their own ground."

On page 48 of his brief, he quotes from a decided case, as follows:

> "As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts." (*Chin Yow v. U. S.*, 208 U. S., at 12.)
>
> *"It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."* (*Kwock Jan Fat,* 253 U. S. at 464.)"

And then in his own language he says:

> "That terrification of the Judiciary arising from the contemplation of Banishment of a Natural-Born Citizen by executive decision, then, led the Court to lay down the rule in Chin Yow's case, that, when a miscroscopical examination of the executive record revealed to the kindly judicial eye some circumstance to which the judicial finger could point as a departure from the mode of procedure prescribed for the executive to follow, which departure rendered the executive decisions void (the mode being the measure of the power), then, because the executive decision was void, a habeas corpus jurisdiction arose, and, jurisdiction having attached would be retained for the whole case, including a hearing of the merits *de novo.* As said in Chin Yow (208 U. S. at 13):
>
> 'The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before a judge.'
>
> So, in the subsequent natural-born-citizen case of Kwock Jan Fat, the Court said (253 U. S., at 465):

> 'The practice indicated in Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits.' "

All that we are contending for this petitioner, a native-born citizen of the United States, is that the validity of her marriage should be rigidly inquired into when the question of her citizenship is at stake. We can conceive of no more valuable right which a minor citizen of the United States can have than that of American citizenship and to take it away upon any trivial, unsatisfactory or frivolous ground is to make American citizenship something as lightly passed over as other requirements which an alien must have to enter this country.

WE HAVE ALLEGED IN OUR PETITION THAT THE DECISIONS OF THE BOARD OF SPECIAL INQUIRY AND OF THE SECRETARY OF LABOR ARE ERRONEOUS IN LAW AND THAT SAID OFFICIALS HAVE MISCONSTRUED THE EXPATRIATION LAWS OF THE UNITED STATES.

Respondent, in the lower Court, contended that the findings of the Immigration Department are conclusive and could not be disturbed by any Court. With this contention we cannot agree.

The case of

> *Ex Parte Hing* (decided January 19th, 1927), 22 Fed. (2d) 554,

is absolutely conclusive on the point for which we are contending, that is, that the Court may, in a so-called "citizenship case," which we insist is sui generis, fully

and exhaustively go into the testimony as disclosed by the record, and may determine for itself whether or not there was in fact a marriage. The Court uses this language:

> "The marriage ceremony of China, as well as the Mohammedan ceremony, may be very primitive. This court may not take judicial notice of foreign laws or customs; the court must apply local laws and customs to any controverted fact in the absence of proof. *United States citizenship is a very substantial right.* It is the highest political privilege which an individual may enjoy. * * *
>
> If the applicant is *legally* married to an alien ineligible to citizenship, she has expatriated herself, and may not be admitted. Ex parte (Ng) Fung Sing, supra. The fact that some ceremony was performed does not show legal marriage, and *the belief of the applicant and her alleged husband of the marriage status would not of itself establish the relation.* Ex parte Morel (D. C.) 292 F. 423. Nor would the fact that the applicant sought a divorce and obtained an interlocutory decree establish marriage, if, in fact, such relation had not been consummated. A marriage in China, consummated by a Mohammedan ceremony, not in harmony with the Chinese law or custom of marriage, would have no more operative effect than a marriage, consummated in California, pursuant to a ceremony of French custom in the republic of France. See Ex parte Morel, supra. *There is no competent evidence before the court* to show that the applicant has been legally married, or that there has been consummated a relation which binds the applicant to her alleged husband, upon which she could predicate a claim for support, or inheritable right of a surviving spouse in the event of death.
>
> The writ will therefore be granted, returnable on the 21st day of March, 1927, with the provision that, pending return, the Immigration Depart-

> ment grant a rehearing *for the production of further testimony* with relation to the marriage and that such testimony, together with the findings of the Board of Special Inquiry, be transmitted to the Secretary of Labor as on appeal, and the final additional record be incorporated in the return of the Commissioner of Immigration to this writ. On failure to comply with the provision herein, on or before the return day herein, or such further time to which the return may be extended by the court, the writ will be granted and the petitioner discharged. The petitioner will be released on filing a bond, or recognizance, with the usual conditions, in the sum of $500.00, pending this hearing."

On further hearing on this case it was held that the marriage of the petitioner was not arranged by the parents, but by the parties; that there was no investigation of the respective histories of the families in duplicate for three generations made, nor was such record exchanged between the parties or the families, nor ancestral and family worship and pledge observed; and that no matrimonial letters or cards were exchanged, nor were any of the requirements of Chinese custom observed; that in effect the bride and groom eloped and some ceremony was performed by a Mohammedan priest. It is to be noted that there was no termination of the marriage in the *Hing* case.

We submit that this case squarely negatives the contention of counsel that a finding of the executive branch of the Government is conclusive, but does unequivocally hold that in just such a case as the case at bar the Court may go fully into the facts and is not bound by the findings of the Immigration Department.

On this same point, that is, the question as to whether a finding of fact by an executive branch of the Government is conclusive or whether the Court may inquire into the testimony and the facts, we wish to cite the case of

Kaoru Yamataya v. Thos. M. Fisher, etc., 23 Sup. Ct. Rep. 611 (decided April 6th, 1903).

In this case a Japanese woman landed at the Port of Seattle and was denied admission on the ground that she was a pauper and a person likely to become a public charge. We wish to call the Court's attention to the fact that this woman was excluded from this country by the Act of March 3rd, 1891, which Act excluded aliens of certain classes.

The Court uses this language:

> "The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude *aliens* of a particular race from the United States; prescribe the terms and conditions upon which certain classes of *aliens* may come to this country; establish regulations for sending out of the country such *aliens* as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention,—are principles firmly established by the decisions of this court. Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. Ed. 1146, 12 Sup. Ct. Rep. 336. * * *"

Quoting from *Nishimura Ekiu v. United States,* supra, the Court says:

> "The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having

the general management of foreign relations, or to the Department of the Treasury charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of *foreigners*, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority.

After observing that Congress, if it saw fit, could authorize the courts to investigate and ascertain the facts on which depended the right of the *alien* to land, this court proceeded: 'But on the other hand, the final determination of *these* facts may be intrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. * * * It is not within the province of the judiciary to order that *foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law,* shall be permitted to enter, in opposition to the constitutional and *lawful* measures of the legislative and executive branches of the national government. *As to such persons,* the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. * * *''

And again, quoting from *Lem Moon Sing v. U. S.* (158 U. S. 538), the Court uses this language:

"The power of Congress to exclude *aliens* altogether from the United States, or to prescribe the terms and conditions upon which they may

> come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. And in Fok Yung Yo's case, the latest one in this court, it was said: 'Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country'."

And later on the Court says:

> "* * * Now, it has been settled that the power to exclude or expel *aliens* belongs to the political department of the government and that the order of an executive officer invested with the power to determine finally the facts upon which an *alien's* right to enter this country, or remain in it, depended, was 'due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.' "

We submit that clearly the Court, in the *Yamataya* case, supra, sharply differentiated between the rights of *aliens* and those of others, and made such discrimination advisedly and intentionally and with the obvious purpose of holding, by implication, that *where petitioner, in a case of this kind, is a native-born citizen (and in our case a minor) of the United States, and not an alien, who it is contended by the Government has forfeited her citizenship, the burden is upon the Government to show that she has so forfeited her citizenship, and the courts can and will inquire fully and exhaustively into the facts of the case to see if this native-born (minor) citizen, entitled to all the protection of our laws and the Fifth Amendment to*

the United States Constitution, has in fact expatriated herself.

Surely it will not be urged by the Government that the petitioner in this case is an alien in the ordinary sense of the word, because an alien is one who is foreign-born, and petitioner is a native of the State of California, and we contend that she, as such native-born girl of the State of California, is on an entirely different footing from an alien, that is: a foreign-born person; and we further contend that this precise distinction is clearly made by the Court in the *Yamataya* case, supra, as well as in the Hawaiian case, cited infra.

We also wish to cite, on this branch of the argument:

Chin Shue Teung v. Tillinghast, etc., 33 Fed. (2d) 122, Decided May 31st, 1929;

Wong Tsick Wye, et al. v. Nagle, etc., 33 Fed. (2d) 226, Decided June 24th, 1929;

Young Bark Yau v. United States, 33 Fed. (2d) 236, Decided June 17th, 1929;

Weedin, etc. v. Jew Shuck Kwong, 33 Fed. (2d) 287, Decided June 24th, 1929;

Tillinghast, etc. v. Wong Wing, 33 Fed (2d) 290, Decided October 30th, 1928;

Terzian v. Tillinghast, etc., 33 Fed. (2d) 803, Decided June 20th, 1929;

Chin Gim Sing, et al. v. Tillinghast, etc., 31 Fed. (2d) 763, Decided April 3rd, 1929;

Hom Moon Ong v. Nagle, etc., 32 Fed (2d) 470, Decided April 29th, 1929;

Go Lun v. Nagle, etc., 22 Fed. (2d) 246, Decided October 24th, 1927.

In the last cited case, by way of showing how far the Courts will go in inquiring into the testimony in cases of this character, we quote as follows:

> "A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony."

We wish also to cite the case of

Moy Fong v. Tillinghast, Commissioner, 33 Fed. (2d) 125, Decided June 12th, 1929,

and to call your Honors' attention to the fact that this case, like the case at bar, is a citizenship case, and it will be noted that the Court comments upon this fact and goes into the evidence adduced before the Immigration Commissioner and finds that the applicant did not have a fair hearing.

If it be contended by respondent that the only time the Courts may go into the testimony and evidence is where the question of an unfair hearing is at issue, then our answer is that in the case at bar, where the finding of the Immigration Department is so palpably unsupported by the testimony of the witnesses, such a hearing is, from the utter irreconcilability of the finding with the testimony, tantamount to an unfair hearing.

EVEN IF WE CONCEDE, ARGUENDO, THAT THE COURTS MAY NOT DISTURB THE FINDINGS OF FACT OF THE IMMIGRATION DEPARTMENT, THEY MAY UNQUESTIONABLY INQUIRE AS TO WHETHER THE IMMIGRATION DEPARTMENT HAS MISCONSTRUED THE LAW OR LAWS IN QUESTION.

The Immigration Department of our Government, arbitrary as it oftentimes is, *cannot misconstrue the laws of the United States.* In other words the Courts may always inquire to see if the evidence supports the conclusion of law. If any authority upon this proposition is needed, we have it in the case of

> *United States, ex rel. Singleton v. Tod, Commissioner of Immigration,* 290 Fed. 78, Decided May 7th, 1923.

We find the learned Court quoting from the United States Supreme Court decision in the case of

> *Ng Fung Ho v. White,* 42 Sup. Ct. 492.

> "* * * But where there is jurisdiction, a finding of fact by the Executive Department is conclusive (U. S. v. Ju Toy, 198 U. S. 253); and Courts have no power to interfere *unless there was either denial of a fair hearing* (Chin Yow v. U. S. 208 U. S. 8) *or the finding was not supported by the evidence* (American School v. McAnnulty, 187 U. S. 94), *or there was an application of an erroneous rule of law* (Gegiow v. Uhl, 239 U. S. 3). To deport one who so claims to be a citizen obviously deprived him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S. 8, 13. It may result, also, in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guaranty of due process of law. The difference in security of judicial over administrative action has been adverted to by this court"—

citing U. S. v. Woo Jan, 245 U. S. 552, 38 Sup. Ct. 207, 62 L. Ed. 466.

As a matter of fact the rule quoted brings the case at bar under all three of the exceptions to the rule that the Courts will not interfere with a finding of the Executive Department;—that is to say except where *there has been a denial of a fair hearing, or the finding was not supported by the evidence, or that there was the application of an erroneous rule of law.*

We have alleged such application of an erroneous rule of law in our petition and we submit that this Honorable Court under the authority just referred to, may go exhaustively and fully into the facts to ascertain whether the Board of Special Inquiry and the Secretary of Labor have misconstrued the expatriation laws of the United States.

THERE IS A VITAL DISTINCTION BETWEEN EXPATRIATION ACCOMPLISHED BY AN ACTUAL RENUNCIATION OF ALLEGIANCE BY BECOMING A NATURALIZED CITIZEN OF ANOTHER COUNTRY, AND THAT BROUGHT ABOUT BY THE MARRIAGE OF AN AMERICAN-BORN WOMAN TO AN ALIEN INELIGIBLE TO CITIZENSHIP.

It is our contention that it was never intended that an American-born woman who expatriates herself by marriage to an alien should be considered in the same class with such a woman who actually renounces her allegiance to the United States by becoming a naturalized citizen of another country. We have nowhere been able to find a case holding that where an American-born woman has so lost her citi-

zenship she may not regain it again, but must thenceforth be without a country.

Surely the Government will not seriously contend that there is any analogy between the case of an American-born woman voluntarily renouncing her allegiance to the United States and becoming by her own intentional act, a citizen of another country, and the case of an American-born woman who is alleged to have married an alien ineligible to citizenship, and then, because of a subsequent divorce,—finding herself with no citizenship at all, but in the very terrible situation of being a "woman without a country."

In one case a voluntary exchange of American citizenship for citizenship in another country is made by the woman, and in the other case a complete bereavement of citizenship is effected, not through the intentional, voluntary act of the woman, but only as an incident to the principal object sought to be accomplished, that is to say, the marriage.

In the case of renunciation by naturalization in another country, the act itself causes the loss of citizenship, whereas in the case of marriage to the alien, the act itself is consummated for the purpose of bringing about the marriage of the parties, and as a mere incident thereto it causes the loss of the citizenship. In the one case the loss of citizenship is irrevocable and in the other case the citizenship is lost subject to the right to regain it upon termination of the marriage.

SUMMARY.

We have then the picture of a native-born minor citizen of the United States, leaving her native land and going through some sort of alleged (we may almost say, mock) marriage to a Japanese alien. The Board of Special Inquiry was so much in doubt (and well it might be) as to whether this girl had been married at all, that the hearing was reopened once and adjourned on several occasions for the purpose of endeavoring to decide just what this petitioner did in fact do.

The testimony is conclusive that petitioner was married without the consent of her parents and that she was coerced into the marriage, that she never lived with her alleged husband; that she objected to the marriage as soon as she learned of it; continued to object, and in fact, still continues so to object; and that she promptly caused her name to be re-registered back into her own family.

The immigration authorities relied upon opinions which amounted to pure conclusions of law and in some cases, as shown by the record, even accepted an opinion in the nature of a conclusion of law from the interpreter who was present at the hearing.

The record conclusively shows that a lay opinion by way of letter from the Consul General of Japan, not under oath, seems to have been the final determining factor in persuading the Immigration Department to take from this American-born woman her citizenship.

CONCLUSION.

We contend for this petitioner, a native-born minor citizen of the United States, that the validity of her alleged marriage, should, and in fact, under the law must, be rigidly inquired into when the sacred right of American citizenship is at stake. We are confident that your Honors will find that there was never any marriage at all between the parties, but that if there was one, it was promptly annulled.

If, however, your Honors are satisfied that there was a marriage which has not been annulled, then there was at least a divorce, because this was the finding of the Immigration Department itself. Therefore, this petitioner under the right which is given her by virtue of her United States nativity and the Fifth Amendment to the Constitution of the United States, and the right which is specifically given her under the authority of the *Hoshino* case, supra, may be admitted into the United States to regain that most valued and sacred of all possessions, her United States citizenship. While there is any doubt at all as to the citizenship of one claiming it, that doubt should be resolved in favor of the claimant.

We have made a most thorough and exhaustive study of this case because we consider it to be one of vital importance not only to the petitioner herself but to every American-born woman or girl, because, potentially, every American-born woman or girl could become a victim of the grievous error made by the Immigration Department in taking from this petitioner her citizenship.

In all our study and research, we have found no language so appropriate to use in closing this brief as that found in the case of *Kwock Jan Fat v. White,* 40 Sup. Ct. 566, supra, and here repeated:

> "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

Dated, San Francisco,
November 6, 1929.

Respectfully submitted,

ALBERT H. ELLIOT,
GUY C. CALDEN,
Attorneys for Appellant.

RAYMOND L. FRICK,
Of Counsel.